

The State of South Carolina



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2765

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Opinion No 87-45

pg 123

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May 12, 1987

The Honorable Isadore E. Lourie  
Member, South Carolina Senate  
303 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Lourie:

In a telephone call to this Office you indicated that the terms of Richland County magistrates expired in April of this year. Such would be in compliance with the provision of Act No. 123 of 1963 which states "(t)he terms of all magistrates hereafter appointed in Richland County shall expire on the fifteenth day of April of each year following the year in which there shall be a general election in which there shall be no election for office of President of the United States." You have questioned whether the Governor may appoint individuals to the magisterial positions after the General Assembly has adjourned.

Section 1-3-210 of the Code states in part:

(a)ny vacancies which may happen in any of the following offices during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next session: ... (3) magistrates ... If the Senate does not advise and consent thereto at such next session, the office shall be vacant.

In a previous opinion of this Office, 1977 Op. Atty. Gen. No. 77-320, a copy of which is enclosed, this Office determined that in an instance where a magistrate, who had been suspended upon indictment, was convicted during a period when the State Senate was not in session, the office would become vacant. At such time, the Governor would be authorized to appoint an interim magistrate. The opinion further stated that the Governor must

The Honorable Isadore E. Lourie  
Page 2  
May 12, 1987

thereafter submit an appointment to the Senate at its next session.

While Section 1-3-210 would be applicable to the situation described above where a magisterial position became vacant due to the conviction of a magistrate, it appears that such provision would be inapplicable to the situation referenced by you where the magistrates' terms expired during a period when the General Assembly was still in session. Also, pursuant to a further provision of Act No. 123 of 1963, "(a)ll magistrates in Richland County upon the expiration of their terms shall hold office until their successors are appointed and qualified." Such holdover provision is consistent with the general law provision that magistrates "... hold their office for the term of two years and until their successors are appointed and qualified." See: Section 22-1-10 of the 1976 Code.

Pursuant to Article V, Section 26 of the State Constitution, magisterial appointments are made by the Governor "by and with the advice and consent of the Senate." In State ex rel. Lyon v. Bowden, 92 S.C. 393, 75 S.E. 866 (1912), the State Supreme Court determined that under such provision the appointment of magistrates requires the concurrent action of the Governor and the State Senate. Therefore the Governor's power to appoint individuals to the office of magistrate is expressly limited and conditioned on the advice and consent of the Senate. See also: Op. Atty. Gen. dated January 5, 1968. As stated by the Court in Bowden,

... when a term of office is fixed by law at a term of years and until the appointment or election and qualification of a successor, the term of the incumbent does not end and there is no vacancy until the expiration of the time named and the appointment or election and qualification of his successor.

92 S.Ct. at 400. (emphasis added.) In another prior opinion of this Office dated December 17, 1984, it was determined that the term "and" as used above is to be interpreted in the conjunctive sense. See also: 1 A Sutherland Statutory Construction Section 21.14. Therefore, two conditions must be met to determine if a vacancy in a magisterial position has occurred: (1) the expiration of a term and (2) the appointment and qualification of the successor, i.e., approval by the State Senate.

The Honorable Isadore E. Lourie  
Page 3  
May 12, 1987

Referencing the above, the provisions of Section 1-3-210 of the Code would be inapplicable to the situation involving the Richland County magistrates whose terms of office expired in April of this year. Inasmuch as such magistrates are directed to holdover in office until their successors are appointed and qualified, there is currently no vacancy in such magisterial offices. Therefore, aside from the fact that the magisterial terms expired during a period when the State Senate was in session, Section 1-3-210 would be inapplicable because, as stated above, Richland County magistrates are directed to holdover in office until their successors are appointed and qualified. Until such time there would be no vacancy in such positions.

If there is anything further, please advise.

Sincerely,



Charles H. Richardson  
Assistant Attorney General

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Enclosure

REVIEWED AND APPROVED BY:



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